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DATE: March 21, 2003

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SPECIAL MASTER'S FINAL REPORT

The Honorable Johnnie Byrd
Speaker, The Florida House of Representatives
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: HB 787 - Representative Seiler
Relief of Pena

SPECIAL MASTER'S FINAL REPORT

THIS HAS BEEN AN AGGRESSIVELY PRESENTED AND VIGOROUSLY CONTESTED VERDICT-BASED EXCESS JUDGMENT CLAIM FOR \$1,101,061 IN FUNDS OF THE CITY OF HIALEAH TO COMPENSATE JOSE PENA AND JOHAMMES PENA FOR THE DEATH OF CARMEN MATOS DE PENA, KATHERINE PENA, AND RICHARD PENA, AS A RESULT OF THE OPERATIONAL LEVEL NEGLIGENCE OF THE CITY OF HIALEAH IN MAINTAINING THE SHOULDER OF A CITY ROAD. THE CITY HAS ALREAD PAID THE UNDERLYING \$200,000 SPECIFIED BY LAW.

FINDING OF FACT:

1. THE CRASH: Just after dusk on Sunday, October 21, 1990, Carmen Matos de Pena was driving a 1981 Mercury west on West 68th Street in Hialeah. She had a valid Florida learner's permit. Riding in the front seat of the vehicle was Jose Pena, her former husband, who was the registered owner of the vehicle. Their three children, Johammes Pena, age 16; Richard Pena, age 12; and Katherine Pena, age 6, were riding in the back seat. Everyone was wearing a seatbelt. The evening was cloudy, the asphalt road was dry, and there were no streetlights lighting the area.

Near the intersection of West 68th Street and West 26th Drive, for some unknown reason, the car drifted off the right (north) edge of the pavement. At least the two right tires of the car left the paved portion of the roadway. Carmen apparently attempted to steer the vehicle back onto the roadway. It is

unclear whether both right tires ever returned to the pavement.

During these maneuvers, the right rear tire was punctured and blew out. The vehicle veered sharply to the right and crossed a 35-foot wide shoulder and dirt embankment area that dropped steeply to the water-filled east/west canal that ran parallel to the north side of West 68th Street. The vehicle plunged in and sank upright with doors shut and windows up.

Jose and Johannes survived and sustained minor physical injuries. Although Carmen, Richard, and Katherine also were extracted from the vehicle, hospitalized, and placed on life support, none of them survived. Carmen died 8 days after the crash, Katherine died after 11 days, and Richard lingered the longest and died after 66 days.

2. ROADWAY AND SHOULDER: Along the roadway in the vicinity of the scene of the crash there was a 3 to 4 inch drop-off between the paved surface of the roadway and the shoulder area. The City of Hialeah owned, maintained, and controlled the roadway and the shoulder. Even though the city had no formal program for inspecting and maintaining the road shoulders, city personnel were generally aware of this unrepaired drop-off. The city had posted no signs in the area to warn of the drop-off.

The posted speed limit was 35 m.p.h. The City of Hialeah Police Traffic Investigator concluded on his official crash report that the vehicle was not exceeding the posted speed limit.

There were no pre-existing mechanical defects found in the car and no evidence of intoxication or physical impairment of the driver. The traffic homicide investigating officer concluded that the drop-off contributed to the accident, causing the right rear tire to blow out. He identified a scratch mark on the pavement wall where the blowout occurred and the car had attempted to climb back on the road.

BATTLE OF THE EXPERTS: *Claimants' expert* was of the opinion that the city had not properly maintained the shoulder. Contrary to the Florida Department of Transportation Manual of Uniform Minimum Standards for Design, Construction, and Maintenance for Streets and Highways, commonly called the "Green Book," the city had allowed a 3 to 4 inch difference to develop between the surface of the roadway and the shoulder. Irrespective of the Green Book, the claimants' expert was of the opinion the shoulder drop-off was hazardous under general engineering principles. According to this expert, the drop-off, in conjunction with the jagged edge, was the most probable cause for the blowout. According to him, this was a typical drop-off collision in which the right tires of the vehicle go off the roadway and an overcorrection is made to the left as the driver tries to get the two wheels back onto the pavement. His scenario was that the right rear tire scrubbed along the pavement edge and blew out. The blowout forced the car to go back to the right,

compounding the driver's natural tendency to steer to the right so as not to go into the lane of the oncoming traffic.

Respondent's expert was of the opinion that the damage to the right rear tire illustrated a "rim nip" condition that occurred when the lip of the wheel rim cut through the tire. According to him, for the rim nip to occur, the tire had to be almost flat. He found no tire scrubbing, which would indicate there was no contact with a drop-off. He also pointed out that there was "browning" on the tire, which was indicative of running the tire while under inflated. Given the length of the rim nip, damage adjacent to the tread, damage adjacent to the tire body, and damage to the rim, he concluded the tire ran over something two inches long while in under inflated condition. It was his opinion that the scratch observed by the traffic homicide investigation officer could not have been caused by the right rear tire. It was further his opinion that the road drop-off did not cause the rim nip in this case. However, at trial, under vigorous cross-examination, Respondent's expert ultimately admitted that he had no opinion as to what caused the crash.

3. JOSE PENA'S CREDIBILITY: The city has aggressively sought to discredit Jose Pena by introducing evidence of his marital and immigration status.

a. Carmen Pena as Jose Pena's "Wife": *The following chronology will assist in summarizing this evidence:*

<u>DATE</u>	<u>EVENT</u>
11/10/73	Jose married Carmen in Dominican Republic.
01/12/88	Jose divorced Carmen in Dominican Republic.
01/29/88	Jose "married" Patsy Ann Hall in Dade County.
11/25/89	Jose file a Petition for Dissolution of Marriage to Patsy Ann in Dade County.
10/01/90	Final Judgment entered dissolving marriage of Jose and Patsy Ann Hall in Dade County.
10/21/90	Crash occurred.
10/29/90	Carmen died.
04/23/96	Jose obtained United States citizenship.

At the trial, the city proved that Jose Pena:

- Had filed a notice of claim for life insurance proceeds on the death of Carmen Pena falsely indicating Carmen was his spouse, even though he was not married to her at the time of her death.
- He falsely claimed Carmen as his wife on his 1989 federal income tax return, even though he was not married to her at that time, and he had misstated on a marriage license application his number of previous marriages.

b. Jose Pena's Immigration: Mr. Pena admitted that his

subsequent marriage to Patsy Ann Hall was a sham. He had never met her, and there was no marriage ceremony. He also admitted that he was attempting to obtain legal residency in the United States; that he paid someone \$2,000 to arrange and document a "marriage" and a work permit; and when he went back to find the person to whom he had given the money, the individual was gone and so was the \$2,000.

Mr. Pena testified he did not get his permanent residency through the marriage to Patsy Ann Hall, but that he qualified for permanent residency through a subsequent amnesty program.

CONCLUSION OF LAW:

Some see the Legislature's role in claim bills against government agencies as merely rubber-stamping and "passing through" for payment those jury verdicts that have been reduced to judgment and survived appeal, as this one has. Others see the Legislature's role as a de novo responsibility to review, evaluate, and weigh the total circumstances and type of the public entity's liability, and to consider those factors that might not have been perceived by or introduced to the jury or court.

Whichever of these two views each lawmaker holds, at the Special Master's level every claim bill, whether based on a jury verdict or not, must be measured anew against the four standard elements of negligence.

And of course, with or without a Final Judgment, the claims relief procedure is generally acknowledged to be completely discretionary with the Legislature. Fernandes v. Barrs, 641 So.2d 1371, 1376 (Fla. 1st DCA 1994); South Broward Toppeekeeyugnee Park District v. Martin, 564 So.2d 1265, 1267 (Fla. 4th DCA 1990), review denied mem., 576 So.2d 291 (Fla. 1991).

The Florida appellate courts have determined that a governmental entity has the legal responsibility for injuries proximately resulting from dangerous drop-offs at the shoulders of its roads, Manning v. State Department of Transportation, 288 So.2d 289 (Fla. 2d DCA 1974); cert. denied, 295 So.2d 307 (Fla. 1974). Although a city cannot and should not be held liable for highly unusual, extraordinary, or bizarre consequences resulting from a breach of its duty to protect motorists from dangerous conditions, it is my opinion that there was nothing highly unusual, extraordinary, or bizarre about Mrs. Pena's maneuver. Furthermore, this is not the first reported case where the City of Hialeah has contested a jury award of money to the family of a driver who ended up in a partially obscured canal where the allegations were that the City of Hialeah had failed to erect barricades or otherwise sufficiently warn motorists of the existence of a partially obstructed canal.

In City of Hialeah v. Revels, 123 So.2d 400 (Fla. 3 rd DCA 1960), the Third District Court of Appeal upheld a verdict and a wrongful death Final Judgment based on it against the city's claim that it was excessive.

LIABILITY: From my review of the law and the evidence, I find the city had a duty to maintain the roadway/shoulder area near the scene of the crash. The city breached that duty and that breach was a proximate cause of the crash that resulted in the deaths of claimants' decedents.

DAMAGES: Damages as found by the jury and in the Amended Final Judgment were as follows:

Damages	Jury Award	Amended Final Judgment
Medical and Funeral Expenses:		
Carmen	\$ 46,093.38	\$ 34,570.34 (25% reduction – comparative negligence – Carmen Pena)
Katherine	\$104,527.78	\$ 78,395.84 (25% reduction – comparative negligence – Carmen Pena)
Richard	\$322,932.87	\$ 187,500.00 (25% reduction – comparative negligence – Carmen Pena)
Past and Future Pain and Suffering by Jose Pena for:		
Katherine Pena	\$500,000.00	\$750,000.00 (25% reduction – comparative negligence – Carmen Pena)
Richard Pena	\$500,000.00	
Total	\$1,723,554.00	\$1,292,665.53

In addition, the Amended Final Judgment taxed costs against the City in the amount of \$8,395.61. Thus, under the Amended Final Judgment, the total amount awarded to claimants was \$1,301,061.14.

ATTORNEYS FEES:

Section 768.28(3), F.S., limits claimant's attorneys' fees to 25 percent of the claimant's total recovery by way of any judgment or settlement obtained pursuant to s. 768.28, F.S. Claimants' attorneys have acknowledged this limitation and verified in writing that nothing in excess of 25 percent of the gross recovery will be withheld or paid as attorney's fees.

LEGISLATIVE HISTORY:

Bill History – 1998 Session: This claim was filed by Representative Regulation as HB 3083 (1998). CS/HB 3083 was adopted by the Civil Justice and Claims Committee. The CS was passed by the House with 91 yeas and 23 nays; and then died at the Senate committee level.

The Senate companion, SB 64, received a favorable recommendation by both the Senate Community Affairs and Ways and Means Committees. It was reported to the Senate Calendar on January 21, 1998, where it remained until it died on May 1, 1998.

1999 Session: The claim was filed by again by Representative Eggelletion as HB 525 (1999). The bill was considered and recommended favorably by the House Special Master and the Committee on Claims. It then went to the Calendar where it died on April 30, 1999.

The Senate companion, SB 8, received a favorable recommendation by the Senate Special Master, the Committee on Comprehensive Planning, Local and Military Affairs, and the Committee on Fiscal Resource. The bill went to the Special Order Calendar where the conforming amendment recommended by the Special Master and the two reviewing committees was adopted. The bill was never revisited and died on third reading.

2000 Session: The claim was filed by Representative Ritter as HB 353 (2000). The bill was referred to the Claims Committee where it died on May 5, 2000.

The Senate companion, SB 22 (2000). The bill was agendaed twice by the Senate Committee on Comprehensive Planning, and Local and Military Affairs but was not considered at either meeting. The Senate sponsor withdrew the bill from further consideration by the Senate on April 4, 2000.

2001 Session: The claim was filed by Representative Ryan as HB 709 (2001). It was referred to the House Claims Committee where it died on May 4, 2001.

The Senate companion, SB 28 was considered by the Senate Committee on Comprehensive Planning, and Local and Military Affairs on March 6, 2001 and received a favorable recommendation. The bill died in the Senate Committee on Finance and Taxation.

2002 Session: The claim was filed by Representative Greenstein as HB 529 (2002). It was referred to the House Claims Committee where it died. The Senate companion, CS/SB 4 by Senator Campbell, passed all committees of reference and passed the full Senate, but died in House Messages.

Supplemental Information: Both sides in this dispute have been given the opportunity to provide further supplemental information and argument supporting or opposing the 2003 version of this claim.

In the 2000 session, and by supplemental response filed October 23, 2001, the City of Hialeah additionally argued that the negligence of the city was, at worst, passive and not sufficient to surpass the \$200,000 limitation on collectability contained in s. 768.28, F.S.; that the canal situation, common in Dade County, was an obvious, not hidden hazard that the Penas were well aware of; that the area of the shoulder drop-off was "totally remote" from the point where the vehicle left the roadway thus breaking the proximate cause link to the crash; that there was and is essentially an empty chair at the defense table, namely Metropolitan Dade County, that had maintenance responsibility for the canal itself and for not building a barrier system along its edge; that the claimant's blow-out/over-steer scenario was "fictional" and "invented" by claimants' expert witness, totally opposed by credible, unbiased testimony of a pedestrian eye witness who testified that the Pena vehicle turned directly off the paved portion of the road and vaulted at an unswerving angle, some 50 feet across a 35-foot wide shoulder and directly into the canal; that the jury's award of damages was irresponsible, overly sympathetic, and not based on the testimony and evidence presented to it; and finally, that claimant Jose Pena told a series of lies, was a documented perjurer, a sham pleader, a fraud perpetrator, an invoker of the 5th Amendment, a total fabricator, and a tax cheat, who did not deserve legislative grace.

The claimant responded both in 2001, and in preparation for the 2002 session, saying that Hialeah's supplemental submission contained nothing but the warmed-over arguments that had been made at trial, on appeal, and at the previous Special Master's hearings; that the Pena family was tagged by the jury with 25 percent of the fault; and that the courts have already reduced the claim to reflect Mrs. Pena's partial responsibility for the crash.

RECOMMENDATION:

There is only issue I wish to revisit is Hialeah's argument that the area of shoulder drop-off and the point where the physical evidence showed the vehicle left the paved portion of the roadway were "totally remote" thus breaking the required element of proximate causation.

Based on the following, it is my opinion that there remains a sufficient nexus between the shoulder drop-off and the place where the vehicle left the pavement (and thus a legally proximate relationship between them): Ernest Hortsly, City of Hialeah Traffic Engineer, testified that his own department generally knew about the drop-off "at that point" [of the accident]. In addition, Officer J.J. Samuelson, Hialeah Police Department Traffic Homicide Investigator, identified an area of

a 4-inch drop-off where he “suspected the Pena vehicle came back on the roadway prior to going into the canal.” His trial testimony identified between 400 and 500 linear feet of shoulder, generally straddling this intersection, which had eroded away between 3 and 4 inches deep.

The bottom line is that none of the witnesses could point out precisely the exact spot where the Pena’s’ right front tire first dropped into the shoulder rut. While the fresh rubber black mark may or may not have related to this crash, the sum of their testimony, in my opinion, provides a sufficient connection between the resting place of the car in the water and the defective shoulder.

Accordingly, I recommend that HB 787 (2003) be reported FAVORABLY.

Respectfully submitted,

Stephanie Birtman, Esq.
House Special Master

cc: Representative Seiler, House Sponsor
Senator Campbell, Senate Sponsor
Senate Special Master - D. Stephen Kahn, Esq.
House Claims Committee